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WICKHAM *et al. v.* GREEN.

June 9, 1910.

[68 S. E. 259.]

1. Dismissal and Nonsuit (§ 58*)—Declaration—Failure to File.—Under Code 1904, § 3241, providing that, if one month elapsed after process returned executed without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared, it is the mandatory duty of the clerk under such circumstances to enter the suit dismissed, though his omission to do so is a misprision not materially affecting the rights of the defendants; the court being given control at the succeeding term, by section 3293, to reinstate any cause discontinued during vacation, set aside any of the proceedings, or correct any mistake therein, and make such order concerning the same as may be just.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134-139; Dec. Dig. § 58.*]

2. Dismissal and Nonsuit (§ 81*)—Reinstatement of Cause.—The reinstatement of a case at the following term which has been dismissed at rules for want of a declaration may be regarded as a matter of course, provided the effect of the reinstatement is to place the cause in the position it would have occupied but for the irregularity of the clerk's conduct, or for good cause shown where there has been no misprision of the clerk.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 182-191; Dec. Dig. § 81.*]

3. Dismissal and Nonsuit (§ 81*)—Grounds—Declaration—Failure to File—Reinstatement—Excusable Neglect.—Where defendant was entitled to a dismissal of a suit by the clerk for plaintiff's failure to file his declaration within 30 days after service, as authorized by Code 1904, § 3241, and defendant at the succeeding term insisted on dismissal, that it might plead limitations to any subsequent suit brought, it was error to deny defendant's motion to dismiss, and to permit the filing of the declaration at the succeeding term, under section 3293, in the absence of any showing of excuse for plaintiff's default.

[Ed. Note.—For other cases, see Dismissal and Nonsuit Cent. Dig. §§ 182-192; Dec. Dig. § 81.*]

Error to Law and Equity Court of City of Richmond.

Action by C. H. Green against H. T. Wickham and William Northrop, as receivers of the Virginia Passenger & Power Company, the Richmond Passenger & Power Company, and the Rich-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

mond Traction Company. Judgment for plaintiff, and defendants bring error. Reversed.

H. Taylor, Jr., for plaintiffs in error.
O'Flaherty & Fulton and *Edgar B. English,* for defendant in error.

WHITTLE, J. This is a personal injury action, in which there was a verdict and judgment for the defendant in error, who was plaintiff in the trial court.

We are met at the threshold of the case with a question of statutory construction of more than ordinary interest. The summons was issued May 1, 1908 (only 17 days before the right of action would have been barred by the statute of limitations), and was returnable to second May rules, at which rules the process was returned executed, and the case was continued at that and the succeeding June rules for declaration. When more than one month had elapsed after process returned executed without the declaration having been filed, the clerk called attention of counsel for the plaintiff to that fact and notified them that he would be compelled to dismiss the suit. Thereupon counsel requested that the order of dismissal be not entered, as they wished to obtain consent of opposing counsel to file the declaration. Having failed to get such consent, the court at the next term, on motion of the plaintiff, granted leave to file the declaration. The defendants, at a later day of the term, submitted a motion to set aside the former order, and that the clerk be directed to enter the suit dismissed, on the ground that by allowing the declaration to be filed then and refusing to dismiss the suit the defendants would be denied the right to plead the statute of limitations. But the court adhered to its former ruling, and the defendants excepted.

It was the duty of the clerk, by mandatory requirement of section 3241 of the Code, to have entered the suit dismissed. The rights of the defendants, however, were not materially affected by his failure to discharge that function, since such omission was a misprision over which the court is given control at the succeeding term by section 3293. So that at last the question to be determined is whether or not the court could, at the next term, under section 3293, relieve the plaintiff from the consequences of his neglect, without excuse, to file his declaration within the time prescribed by section 3241, by granting leave to file the declaration at that term, when the effect of such ruling is to deprive the defendants of an accrued right to plead the statute of limitations.

It is true that the reinstatement of a case at the following term, which has been dismissed at rules for want of declaration,

may be regarded as a matter of course, provided the effect of such reinstatement is to place the case in the position it would have occupied but for the irregularity of the clerk's conduct, or for good cause shown where there has been no misprision by the clerk. This we think is the rule fairly deducible from the cases of Southall *v.* Exchange Bank, 12 Grat. 315, Wall *v.* Atwell, 21 Grat. 401, Alvis *v.* Johnson, 1 Va. Dec. 381, and Southern Exp. Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17.

Thus, in Southall *v.* Exchange Bank, Judge Lee said: "There can be no doubt, then, that the court might properly, as it did, set aside all the proceedings at rules after the cause had been remanded at the previous term, and permit the plaintiff to do then, in court, what he would and should have done at rules—file his declaration and take judgment for the part not answered by the plea. No injustice could be done by this to the defendant as it only placed the cause exactly where it would have been but for the irregularities which had occurred at the rules."

In Wall *v.* Atwell, *supra,* the court held that the proceedings in the clerk's office had been so irregular that the cause was not properly on the office judgment docket, and should be remanded to rules for proper proceedings.

In Alvis *v.* Johnson, *supra,* the plaintiff was in no default. The clerk kept no rule book, and took no rules. At page 383 of 1 Va. Dec., Judge Anderson says: "If it [the amendment declaration] was not then filed, it was no fault of the plaintiff."

In Southern Express Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17, this court said, in reference to section 3293: "This statute was ample authority for the court's action in overruling the motion to remand, and directing the clerk to make the proper entries in the rule book. * * * It is not pretended that the defendant was misled by any misprision of the clerk, nor is it suggested that any opportunity to file pleas or make any defense was lost by reason of any action on the part of the clerk. It was the duty of the clerk to enter the rules properly as required by the statute. His failure to do so, however, could not, in this case, be prejudicial to the plaintiff, who had done all that was required to entitle him to his office judgment."

So, in Buchanan *v.* King, 22 Grat. 414, it was held that, where the defendant appears and files his answer or plea, or consents to a decree, he will be taken to have waived the dismissal of the cause and will not be allowed to insist on it.

The pretension of the defendant in error leads to this: That if in the present case the clerk had complied with the statute and entered the suit dismissed, still the court could have set aside the act of the clerk, though done in strict compliance with the mandate of the statute, without cause, merely to relieve the

plaintiff from the consequences of his own default. We have seen no case that sustains the contention, and such a construction of section 3293 would be out of harmony with the whole course of administration of justice under our system of jurisprudence, and would defeat the purpose of the revisors in incorporating section 6, c. 171 (the corresponding section to section 3241 of the Code of 1904) in the Code of 1849. See Report of Revisors, p. 844.

The case of Lipscomb's Adm'r *v.* Winston's Adm'r, 1 Hen. & M. 453, is cited for the proposition that a cause dismissed at rules for want of a declaration may be reinstated at the next court as a matter of course; but the grounds for the reinstatement in that case do not appear.

These dismissals by the clerk partake of the nature of nonsuits, and the prevailing rule is that motions to set aside a nonsuit, or to reinstate a suit after dismissal, are addressed to the judicial discretion of the court. The suit is dismissed under section 3241, because of apparent neglect of duty upon the part of the plaintiff, and it should be reinstated only upon explanation, showing that the neglect of duty was only apparent, or, if really existing, that there was excuse or extenuation for it. It is not to be reinstated merely upon showing that the plaintiff would suffer inconvenience or loss by reason of its dismissal, as that would effectually repeal the statute as though its enforcement were left entirely to the arbitrary discretion of the court. In brief, the plaintiff, on moving to reinstate his suit, should be required to show good cause for his motion. Many of the causes which would justify a court in setting aside a nonsuit or in reinstating a dismissed cause are mentioned in 14 Cyc. 423.

The following cases further illustrate the general principle that courts will not relieve against mere neglect of parties in such case: Clark *v.* Stevens, 55 Iowa, 361, 7 N. W. 591; English *v.* Wilkins, 163 Ill. 542, 45 N. E. 287; People *v.* Justices, 1 Barb. (N. Y.) 478; Morrow *v.* Malone, 5 Sneed (Tenn.) 642.

It is always to be regretted when a case has to be disposed of on other grounds than those that go to the very right and merits of the cause. Courts cannot, however, permit considerations of hardship in particular cases to cause them to disregard and set at naught the plain provisions of a positive statute. To do so would be to usurp legislative functions, and would operate a judicial repeal of the statute.

The view that we have taken of the question raised by the first assignment renders the consideration of the remaining assignments of error unnecessary.

The judgment must be reversed, and this court will make such order as the trial court ought to have made, dismissing the case, with costs.

Reversed.

HARRISON, J., absent.

Note.

Any other conclusion than that arrived at by the court in the principal case would have been placing a premium on carelessness and indifference. The plaintiff, without offering any excuse whatever, failed to file his declaration within a month after process was returned executed, and as a result of his delay he has lost his cause of action altogether, it being barred by the statute. This decision will have a very salutary effect no doubt on those who have come to regard rules of practice as rules of convenience, even when prescribed by the statute.

Though it has been held in some jurisdictions that statutes fixing the time for filing pleadings in a case are merely directory, and that the court has it always in its power, in the exercise of a proper discretion, to extend the time fixed by law, whenever the ends of justice seem to demand such an extension. Wood *v.* Fobes, 5 Cal. 62; Sally *v.* Gooden, 5 Ala. 78.

Still the general rule seems to be as stated in the principal case that such statutes are mandatory. Jackson *v.* Wiseburn, 5 Wend. (N. Y.) 136; Fidelity Trust, etc., Co. *v.* Newport News, etc., Co., 70 Fed. Rep. 403.

It is extremely doubtful whether such time could be extended or enlarged even by express stipulation of the parties, though counsel for the plaintiffs in the principal case made an unsuccessful attempt to obtain consent of opposing counsel to file their declaration after the time allowed for so doing had expired. See Crane *v.* Crane, 121 Cal. 99; Johnson *v.* Sweeney, 95 Cal. 304; Blackwood *v.* Cutting Packing Co., 71 Cal. 461; Welsh *v.* Blackwell, 14 N. J. L. 344; Bedell *v.* Bedell, 2 Barb. Ch. (N. Y.) 99; Sniffen *v.* Peck (N. Y. City Ct. Gen. T.), 6 Civ. Pro. (N. Y.) 188; Steele *v.* Moss, 69 Wis. 496.